Supreme Court, U.S.
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In the

Supreme Court of the United States

MICHAEL FLANAGAN, NORBERT KUKSTA, MELVIN SCHABILION, SAUL WEINSTEIN, and FRANCIS E. WHITE,

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES AND DRUG ENFORCEMENT ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the application of Rule 56 of the Federal Rules of Procedure to the issue of pretext by the trial court and by the Seventh Circuit Court of Appeals denied the Petitioners right to a jury trial under the Seventh Amendment.

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PETITION FOR WRIT OF CERTIORARI

Now come Michael Flanagan, Norbert Kuksta, Melvin Schabilion, Saul Weinstein and Francis E. White, Petitioners, and respectfully request that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on January 21, 2003 in *Michael Flanagan et al. v. John Ashcroft, Attorney General of the United States, and Drug Enforcement Administration.*

OPINION BELOW

The affirming Order and Opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported and is reproduced at App. 1, infra.

JURISDICTION

The Judgment of the Seventh Circuit was entered on January 21, 2003. Justice Stevens granted an extension of time in which to file a Petition for a Writ of Certiorari to and including June 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides, among other things:

> the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the Rules of the common law.

Title 42, United States Code, Section 2000(e)(3) (Title VII of the Civil Rights Act of 1964, as amended), in pertinent part, states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * *, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Rule 56 of the Federal Rules of Civil Procedure, in pertinent part, states:

> (b) For Defending Party. A party against whom a claim, counterclaim or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and proceedings thereon. The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This case involves a suit under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e), *et. seq.*) brought by five employees of the United States Drug Enforcement Administration (DEA). The plaintiffs alleged that they had been discriminated against on the basis of gender and race (Count One); and suffered severe re-

taliation for engaging in protected activity as defined in the Statute (Count Two).

The defendants filed motions to dismiss on November 10 and 26, 1997. On June 3, 1998, the trial court dismissed Count One of the Complaint. On January 21, 2003, the Court of Appeals for the Seventh Circuit affirmed that dismissal.

On March 16, 2000, the defendants moved for summary judgment on the retaliation charge (Count Two). On April 28, 2000, the plaintiffs filed pleadings and exhibits in opposition to the summary judgment motion. On May 23, 2000, the defendants filed further pleadings in support of the motion.

The trial court had little difficulty in finding that the plaintiffs produced sufficient evidence to establish a prima facie case of retaliation (Mem. Op. pp. 9-11; App. 27-31). The onus of production then shifted to the defendants to produce evidence of a legitimate, non-discriminatory reason for the adverse action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The employer can satisfy that feeble burden by announcing a non-discriminatory reason and producing but a tincture of supporting evidence and the presumption in favor of the plaintiffs "drops out." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). At that point, the plaintiffs must produce facts sufficient to infer that the proffered reasons are not the true reasons, but were merely pretextual. *Burdine*, *supra*, at 450 U.S. 253. In that case, summary judgment is no longer appropriate, and the plaintiffs must be afforded the full and fair opportunity to demonstrate to a jury that the proffered reason was not the true reason for the employment decision, but was in fact a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

On June 14, 2000, the trial court ignored the evidence that established the *prima facie* case. Relying exclusively on self-serving declarations by high level officials of DEA and the Justice Department, the court granted the defense summary judgment and dismissed the case (App. 5, 6).

The Court of Appeals for the Seventh Circuit minimally discussed the evidence in the record before it, and, on January 21, 2003, affirmed the dismissal of plaintiffs' case (App. 1). As a consequence of the district court's opinion and the decision of the court of appeals, the plaintiffs were denied an opportunity to have the critical issue of pretext now decided by a jury. The question, then, is whether a federal court may, consistent with the Seventh Amendment, grant summary judgment when the moving party produces only self-serving declarations by interested officials.

The Seventh Amendment and Rule 56 of the Federal Rules of Civil Procedure

Since its adoption, the right secured by the Seventh Amendment to the Constitution of the United States has never been intended to insure that all civil cases must be resolved by a jury. It is, however, a right that required disputed material facts to be decided by a jury without judicial intervention except in the narrow circumstances permitted by the common law. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.")

When the Federal Rules of Civil Procedure were adopted, Congress essentially codified the procedure for summary judgment "for promptly disposing of actions in which

there is no genuine issue as to any material fact." *See* Fed.R.Civ.P. 56, Advisory Committee Note (1937), reprinted in 12A Charles Alan Wright, et al., *Federal Practice and Procedure*.

A federal trial court is thus empowered to grant judgment without a jury trial under Rule 56 when it determines that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. Rule 56(c). The standards applicable to Rule 56 motions "mirror the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). That is, judgment without trial is only warranted when there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943).

Constitutional integrity has been preserved by the federal judiciary through strict compliance with the standard. In the past few years, though, the courts have increasingly loosened the strict requirements for granting dispositive motions, perhaps in the interest of judicial economy and docket control. That despite this Court's admonition that trial courts should "act . . . with caution in granting summary judgment [and] . . . the trial court may . . . deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Thus, Rule 56 is intended not as a method of trying issues of fact, or weighing the evidence, but only to determine whether such issues actually exist. Nor can it be used to deprive a litigant of a full trial of genuine material facts as guaranteed by the seventh amendment. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468 (1962); *Sartor v. Arkansas National Gas Corp.*, 321 U.S.

620, 627 (1944). Thus a dispositive motion should be cautiously invoked so that all genuine factual issues will be decided at a trial. *Associated Press v. United States*, 326 U.S. 1, 6 (1945).

The petitioner does not suggest that the proper application of Rule 56 runs afoul of constitutional guarantees, and this Court has so decided. *Fidelity and Deposit Co. of Maryland v. U.S. to Use of Smoot*, 187 U.S. 315, 320 (1902).

A motion under Rule 56 and a motion for a directed verdict under Rule 50 differ in a number of respects. Nonetheless, the standard for granting judgment as a matter of law is the same.

> [T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). *See also Agosto v. Immigration and Naturalization Serv.*, 436 U.S. 748, 770, n.8 (1978). The insidious, yet contant erosion of the right of litigants to have their cases tried by a jury has prompted "grave concerns . . . concerning the constitutional right of civil litigants to a jury trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 267 (1986) (Brennan, Justice, Dissenting).

The Seventh Circuit decision in this case increases dramatically an existing disorder in the courts of appeals about strict compliance with Rule 56, particularly in employment discrimination cases. At both the district and appellate levels, confusing and often contradictory decisions are proliferating rapidly. This nothwithstanding recent efforts by this Court to set out principles for guidance. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

I.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because the opinion below conflicts with this Court's prior rulings concerning the evidence required to establish pretext after the plaintiff has made out a *prima facie* case.

As early as 1973, this Court announced a burden-shifting method to be used in employment discrimination cases where the plaintiff is unable to produce direct evidence of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that method, once the plaintiff has made out a *prima facie* case, a rebuttable presumption of discrimination attaches. 411 U.S. at 802. At that point the burden of production shifts to the defendant to come forth with minimal evidence of a legitimate nondiscriminatory reason for the adverse action. 411 U.S. at 802-03. Once that happens, the rebuttable presumption "drops out of the picture." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The defendant having produced such evidence, the burden shifts to the plaintiff to show that the stated reason was merely a pretext for discrimination. 411 U.S. at 804.

From the beginning the several circuits have been struggling with the issue of pretext and the level of evidence that the plaintiff must produce on that issue to avoid summary judgment. That is, how much beyond the *prima facie* case must the plaintiff go to raise a triable issue that the employer's proferred reasons "were not its true reason, but were a pretext for [retaliation]." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). That which appeared to be a clear cut criterion when developed by this Court, has metamorphized over the years into a higher and higher hurdle to be surmounted by the plaintiff at the dispositve motion stage. The result has been to provide defendants with a ploy to

avoid liability merely by raising a non-discriminatory reason and supporting it with feeble evidence. In this regard, the circuits have been confusing the plaintiff's burden of production with the burden of proof.

For example, the Seventh Circuit has been required to steer an often difficult to discern path between two conclusions. On the one hand, the courts have said that the plaintiff does not, at the pretext stage, face an overly onerous hurdle. *See e.g., Kaniff v. Allstate Insurance Co.*, 121 F.3d 258, 263 (7th Cir. 1997). He is, however, not shielded from summary judgment by a mere unsupported allegation of pretext; or by "an unadorned claim that a jury might not believe [the defendant's] explanation for [the adverse action]." *Giannopoulos v. Bach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997). In any event, to survive a judgment as a matter of law the plaintiff must produce "evidence from which a trier of fact could reasonably infer" that the adverse job action was actually motivated by retaliation. *Troup v. May Department Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994).

Therein lies the problem that the courts were required to meet. How much evidence is required in addition to the *prima facie* case to support an inference of pretext? The very nature of the issue requires an investigation of the employer's intent and state of mind. As a consequence, it is often impossible specifically to contradict the proferred reason. *Russell v. Acme-Evans Company Adm.*, 51 F.3d 64, 68 (7th Cir. 1995) (Evidence to contradict directly the employer's assertions "is rarely within the competence of the plaintiff to give.")

Recently this Court recognized the difficulty of discerning the line between an issue to be determined by the judge and that which must be left to the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In an attempt to give some guidance, this Court focused on

the extent of plaintiff's burden to create a genuine issue of material fact, and observed:

> The court should give credence to the evidence favoring the non-movant as well as the evidence supporting the moving party that is *uncontradicted and unimpeached at least to the extent that it comes from disinterested witnesses."*

Reeves, supra, 530 U.S. at 151 (emphasis added).

Furthermore, this Court admonished the trial courts not to disregard "critical evidence favorable to [the plaintiff]; namely, the evidence supporting [plaintiff's] *prima facie* case and undermining [the defendant's] explanation." *Id*; *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The fact-finder's disbelief of the reasons put forth by the defendant, . . . may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.")

The *Reeves* decision, therefore, effectively eliminates any distinction between evidence a plaintiff uses to reach the *prima facie* plateau of discrimination and the evidence sufficient to meet the burden of establishing an inference of pretext in the dispositive motion. Once the presumption of discrimination "drops out of the picture," petitioners suggest that by producing any evidence of pretext, the plaintiff establishes a triable issue.

In the instant case, both the trial court and the Seventh Circuit panel entirely disregarded this Court's rulings. Instead of examining the issue in the light of plaintiffs' *prima facie* facts and only *uncontradicted and unimpeached* evidence, as required by *Reeves*, the courts elected instead to ignore the evidence that established discrimination *prima facie,* and relied completely on self-serving declarations by high level officials of the DEA and the Department of Justice. Not only is the record below desti-

tute of testimony from "disinterested witnesses"; it abounds with inconsistencies if not outright contradictions in the evidence adduced from those same witnesses. A trier of fact, confronted with those circumstances, could well have disbelieved the proffered reason for the adverse action. That, coupled with the admittedly sufficient *prima facie* evidence was ample to defeat the summary judgment motion.

As a result, the trial court's order and the Seventh Circuit Court of Appeals decision, have deprived these petitioners of the right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

II.

THE QUESTION PRESENTED IS IMPORTANT

Because motions for summary judgment as a matter of law are governed by Rule 56, ignoring the requirements of the Rule and this Court's parameters for application of the standards governing such motions may well jeopardize a party's Seventh Amendment rights. A civil litigant's right to a jury verdict is too important to be stripped away without proper safeguards.

Determining pretext, of necessity, requires an examination of a defendant's intent; which, in turn, rests substantially on a judgment of credibility. It would seem, then, that the issue would preclude summary judgment, particularly in cases where the plaintiff has made out a *prima facie* case of retaliation. In fact, the Second Circuit Court of Appeals has indicated strongly that the issue of pretext *must* be reserved to the trier of fact, and should not be decided by the trial judge in ruling on a dispository motion. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2nd Cir. 1997). "The intent of the employer is a factually disputed matter precluding summary judgment." *Gallagher v.*

Delaney, 139 F.3d 338, 350 (2nd Cir. 1998). That approach is guaranteed to protect a party's Seventh Amendment rights, and yet provide a method for resolving the issue in the fairest possible manner.

In affirming the grant of summary judgment by the trial court, the Seventh Circuit is out of step with the mandate of Rule 56, this Court's prior rulings on the proper standards to be applied, and with the better reasoned opinion of the Second Circuit.

This Court should take this case to resolve the proliferating confusion, and to establish a uniform rule, consistent with Rule 56 and the Seventh Amendment. Litigants should not be subjected to varying and often inconsistent standards concerning the issue of pretext in employment discrimination cases under Title VII.

Certiorari jurisdiction is warranted to correct the error of the Seventh Circuit Court of Appeals and to clarify the law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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